

**BEFORE
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NOS. 2010-14 --19-C**

IN RE:)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v.)
Affordable Phone Services, Incorporated)
d/b/a High Tech Communications)
Docket No. 2010-14-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. Dialtone)
& More Incorporated)
Docket No. 2010-15-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v.)
Tennessee Telephone Service, LLC)
d/b/a Freedom Communications USA,)
LLC)
Docket No. 2010-16-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. OneTone)
Telecom, Incorporated)
Docket No. 2010-17-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. dPi)
Teleconnect, LLC)
Docket No. 2010-18-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. Image)
Access, Incorporated d/b/a New Phone)
Docket No. 2010-19-C)

**RESELLERS' RESPONSE TO
AT&T'S NOTICE OF SUBSEQUENT
DEVELOPMENT**

Affordable Phone Services, Incorporated d/b/a High Tech Communications, Dialtone & More, Incorporated, Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, OneTone Telecom, Incorporated, dPi Teleconnect, LLC, and Image Access, Incorporated d/b/a New Phone (collectively, the “Resellers”) respectfully submit this Response to BellSouth Telecommunications, LLC d/b/a AT&T South Carolina’s (“AT&T”) Notice of Subsequent Development filed with the Public Service Commission of South Carolina (the “Commission”) on February 21, 2012, informing the Commission of the issuance of an Order by the United States District Court for the Eastern District of North Carolina (Western Division) in *dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina, et al.*, No. 5:10-CV-466-BO (the “Order”), a copy of which is attached to AT&T’s Notice of Subsequent Development as Attachment A.

RESPONSE OF RESELLERS

Despite the fact that the North Carolina Federal District Court states that its ruling “is guided by the Court of Appeals for the Fourth Circuit’s decision in *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 447 (4th Cir. 2007),”¹ the Court’s Order is contrary to the *Sanford* decision. The Order cites *Sanford* for the proposition that *Sanford* “requires that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers *by applying the wholesale discount to the lower actual retail price.*”² This is what the Resellers are advocating in the instant proceeding, namely that the Commission’s wholesale discount percentage should be applied to reduce the “lower actual retail price” or “promotional rate” created by the cash back offering.

However, the Order further states the *Sanford* result can be “alternatively” achieved by

¹ See Order, p. 3.

² See Order, p. 5, citing *Sanford*, 494 F.3d at 443-44.

using AT&T's method of reducing the cash back promotion itself – instead of the “promotional rate” created by reducing the normal retail rate by the amount of the cash back promotion – by the wholesale percentage discount. This method of applying the percentage discount *twice*, to both the normal retail rate and the cash back promotion itself, is clearly not what *Sanford* intends. The *Sanford* decision requires that the percentage discount be applied *once* to “the lower actual retail price”³ (the “promotional rate” referred to in the Order) created through the offering of a cash back promotion. The disconnect between the *Sanford* method and the method advocated by AT&T and in the Order arises in cases like those at issue here where the cash back promotion amount exceeds the monthly retail price (e.g., a \$25 service combined with a \$50 cash-back promotion). In these instances, AT&T's methodology, and the “alternative” method set forth in the Order, create a *higher* price to resellers (through a smaller bill credit) than the price paid by AT&T's retail customers, which is exactly the outcome that the Fourth Circuit found unreasonable in *Sanford*. Indeed, the Order violates federal law because it does not require AT&T to sell its services subject to promotions at a wholesale rate *below* the retail rate.⁴ The Order also allows AT&T to use promotions to avoid its wholesale obligation in violation of paragraphs 948 and 950 of the FCC's *Local Competition Order*.⁵ This flaw in AT&T's method and in the Order's interpretation of *Sanford* has been correctly recognized by this Commission in its Directive issued on November 9, 2011.⁶

³ See Order, p. 5, citing *Sanford*, 494 F.3d at 443-44.

⁴ See, e.g., 47 C.F.R. § 51.607. “The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, *less avoided retail costs*, as described in section 51.609.” [Emphasis added.]

⁵ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 at ¶¶ 948, 950 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (emphasis added).

⁶ See Commission Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, 2010-17-C, 2010-18-C and 2010-19-C, Commission Directive dated November 19, 2011 (the “Commission Directive”), pp. 1-2.

The Court's reasoning in support of this unlawful outcome is certain to be overturned on appeal.⁷ First, the Court inexplicably relies on an FCC statement regarding "short-term promotional prices."⁸ There are no short-term (90 days or less) promotions at issue in the North Carolina case (or in this proceeding), as all cash back promotions at issue were offered for periods exceeding 90 days. Thus, any FCC guidance on short term promotions is inapposite. Second, the Court suggests that its error can be overcome based on its legally unsustainable assertion that the effect of its decision (*i.e.*, resellers paying a wholesale rate that is **higher** than the retail rate) "is appropriate and permitted for a period of 90 days or less after which any continuing distortion could be remedied by additional promotional credits."⁹ Because neither the FCC's resale rules and orders, nor the relevant interconnection agreements ("ICAs"), allow for a long term promotion to be treated as a short term promotion, this Order cannot withstand judicial review.

Further, the Court's conclusion that the "distortion" it creates "could be remedied by additional promotional credits" applied **after** 90 days is based on neither fact nor law.¹⁰ The Court does not order AT&T to provide any additional promotional credits. Thus, the Court's

Cash Back Offers. These are rebates to the purchasing consumer that require the purchaser to remain on the BellSouth network for thirty days before the rebate check is forwarded to the customer.

[S]ince the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate. ***In the case where the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended. Therefore, in the special cases where the rebate exceeds the first month's cost of service, we find that the retail discount should not be applied to [the] rebate.*** [emphasis added]

⁷ dPi Teleconnect has appealed the Order to the Fourth Circuit Court of Appeals.

⁸ See Order, pp. 6-7.

⁹ See Order, p. 7.

¹⁰ See 47 C.F.R. § 51.613. The Order's use of the 90-day time period has no logical basis. It is a number taken from the FCC's rules which define the difference between short term and long term promotions. Thus, the FCC's 90-day time period is relevant only to the duration during which the carrier offers the promotion, not the duration in which the customer remains with the underlying carrier. In this proceeding, all of the cash back promotions described in the stipulated facts are "long term" promotions (*i.e.*, promotions offered for more than 90 days).

error will not be fixed by additional credits applied at a later date. Even if the Court had imposed such a requirement, it still would not comply with the FCC's resale rules or the ICAs.

The hypothesis that the Order sets forth – that the “continuing distortion” of a wholesale rate which is greater than retail *could be* “remedied” over time – is specifically prohibited by the FCC: “To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion....”¹¹ Here, the promotion is paid in a lump sum for any person otherwise qualifying and maintaining service for just one month.

Thus, there is no guarantee that the Order's post-90 day potential fix would ever come to pass. For the same reason, there is no guarantee that AT&T's flawed methodology would ever result in a “cumulative” wholesale rate that is less than retail.

Even if the Order could somehow be squared with federal law and *Sanford*, which it cannot, the Order cannot withstand judicial appeal because it disregards entirely the parties' governing ICAs, which make clear that AT&T must make its promotions available to resellers on terms that are no less favorable than those received by AT&T's retail customers. In fact, the ICAs at issue show that AT&T must make promotions lasting 90 days or less available for resale at the promotional rate, but must make promotions lasting longer than 90 days available *at the promotional rate further discounted by the avoided cost*. Thus, for the long term promotions at issue in this case, the resale rate must be *below* the promotional rate.

CONCLUSION

The Resellers respectfully request that the Commission consider the foregoing when rendering a decision on the issues presented in this consolidated proceeding.

¹¹ See *Local Competition Order*, ¶ 950 (emphasis added).

Respectfully submitted this 2nd day of March, 2012.

s/ John J. Pringle, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by electronic mail service on the following this 2nd day of March, 2012:

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